Supreme Court, U.S.
FILED

001739 MAY 22 2001

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

ERNEST A. JANIK, JR., individually, on behalf of Grant Joseph Janik, on behalf of Tyler Newman Janik; LEAH EILEEN JANIK, individually, on behalf of Grant Joseph Janik, on behalf of Tyler Newman Janik,

Petitioners,

v.

AMICA MUTUAL INSURANCE COMPANY; NOBEL SERVICE CORPORATION; and IAS CLAIM SERVICES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX CONTENTS

Page

APPENDIX'S PART "A":

Summary Calendar (**5th Circuit**, entered 1-11-2001) A-1

Order (**Doc #448**, entered 11-16-1999) A-11

Mem. Opinion & Order (**Doc #442**, entered 10-29-1999) A-12

Order (**Doc #419**, entered 11-19-1998) A-19

Court's Charge/Verdict (**Doc #393**, filed 8-27-1998) A-20

Order (**5th Circuit**, entered 2-22-2001) A-25

Judgment (**Doc #394**, entered 5-28-1998) A-27

APPENDIX'S PART "B":

U.S. Constitution's 5th Amendment, Due Process Clause B-1

U.S. Constitution's 7th Amendment, Trial by Jury Clause B-1

Fed.R.Civ.P., Rule 26 ..... B-1

Fed.R.Civ.P., Rule 56 ..... B-12

Fed.R.Civ.P., Rule 60 ..... B-15

APPENDIX CONTENTS – Continued

Page

APPENDIX'S PART "C":

Notice of Appeal (**Doc #449**, filed 12-14-1999) C-1

Janik's Supplemental Declaration (**Doc #447**, filed 11-15-1999) C-4

Janik's Authentication Declaration (**Doc #446**, filed 11-15-1999) C-22

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 99-11385
SUMMARY CALENDAR

ERNEST A. JANIK, JR., INDIVIDUALLY, ON BEHALF OF GRANT JOSEPH JANIK, ON BEHALF OF TYLER NEWMAN JANIK; LEAH EILEEN JANIK, INDIVIDUALLY, ON BEHALF OF GRANT JOSEPH JANIK, ON BEHALF OF TYLER NEWMAN JANIK;
Plaintiffs-Appellants,

v.

CITY OF DALLAS, TEXAS, ETC., ET AL.,
Defendant,

AMICA MUTUAL INSURANCE CO., A RHODE ISLAND COMPANY; NOBEL SERVICE CORPORATION, A DELAWARE CORPORATION DOING BUSINESS AS INSURANCE ADJUSTMENT SERVICES INC.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Texas
Dallas Division

(Filed Jan. 11, 2001)

(3:95-CV-2594-D)

Before REYNALDO G. GARZA, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:[1]

The appellants, Ernest A. Janik, Jr., et al. (collectively "Janiks") appeal the federal district court's denial of their Fed. R. Civ. P. 60(b)(3) motion for relief from judgment and their respective motion to reconsider. For the reasons stated below, we affirm.

In the fall of 1993, the Janiks were renting a home in Dallas, Texas. On October 31, 1993, the Janiks discovered raw-untreated sewage coming up through one of their home's shower drains. The Janiks notified AMICA Mutual Insurance Co., ("AMICA"), the insurance company which had issued them their renter's insurance, of their problem and made a claim. AMICA hired Insurance Adjustment Services, Inc. ("IAS") to process the Janiks' claim.

Inevitably, disputes erupted between the Janiks and IAS and AMICA concerning the handling of the Janiks' claim. AMICA, however, ultimately paid the Janiks $60,000 for their unscheduled personal property damage, the policy limits for unscheduled personal property damages, and $4,425 for additional living expenses. Dissatisfied, the Janiks filed suit against the City of Dallas, AMICA, and IAS.

The federal district court dismissed all of the Janiks' claims against the City of Dallas and several, but not all, of their claims against AMICA and IAS. The Janiks

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[1] Pursuant to 5th Cir. R. 47.5, this Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

appealed the dismissal. The Janiks proceed to trial with their remaining claims against AMICA and IAS. The jury found AMICA and IAS liable. The federal district court, however, entered judgment in favor of AMICA and IAS on the basis that there was no causal link between the liability finding and the damages finding. The Janiks appealed this ruling. On January 26, 1999, the two appeals were consolidated. On July 6, 1999, a panel of this court, in an unpublished opinion, affirmed the federal district court.

The Janiks, on August 30, 1999, filed a Fed. R. Civ. P. 60(b)(3) motion for relief from judgment. The federal district court considered the motion and denied it. The Janiks then filed a motion to reconsider. The federal district court considered the motion and denied it. On December 19, 1999, the Janiks filed their notice of appeal as to these two rulings.

Having reviewed the parties' briefs, the record, and the applicable authority, we AFFIRM the denial of the Janiks' motion for relief from judgment and their motion to reconsider based on the federal district court's opinion which is attached hereto as appendix A.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST A. JANIK, JR., et al.,	§	Civil Action No.
	§	3:95-CV-2594-D
Plaintiffs,	§	
	§	
VS.	§	
	§	
CITY OF DALLAS, et al.,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Plaintiffs Ernest A. Janik, Jr., et al. ("the Janiks") move pursuant to Fed. R. Civ. P. 60(b)(3) for relief from judgment, contending that defendants AMICA Mutual Insurance Company ("AMICA"), and Nobel Service Corporation and IAS Claims Services, Inc. ("IAS") ("the IAS/Nobel defendants"), engaged in misconduct by withholding requested discovery and by utilizing expert testimony that exceeded the scope of the expert's report. The court denies the motion.[1]

1

Plaintiffs sued various defendants arising from an incident in which sewage backed up into their leased home. They alleged *inter alia* claims for breach of contract, bad faith insurance practices, negligence, gross negligence, civil conspiracy and violations of the Texas

[1] Despite the pendency of consolidated appeals in this case, the court has jurisdiction to deny this motion.

Insurance Code. Following a jury trial, the court entered judgment in defendants' favor.[2]

Plaintiffs maintain that defendants committed misconduct by (1) withholding information relevant to customer satisfaction with AMICA, (2) perpetrating wasteful deception and prejudicial confusion about who IAS is or was, (3) withholding critical re-cap notes, (4) failing to produce any documents indicating that the Janiks had demanded a "100% germ-free" cleaning of their property, (5) failing to produce any documents defining or describing what are "generally acceptable claim handling practices" (and by AMICA's failing to produce any documents that opined, advertised, or objectively demonstrated that it routinely gave the benefit of the doubt to an insured's disputed claim), and (6) utilizing expert testimony that strayed from the expert's Rule 26 report. Ps. Mot. at 2-10.

II

A

A motion for relief under Rule 60(b) is extraordinary. *Washington v. Patlis*, 916 F.2d 1036, 1038 (5th Cir. 1990). "That spirit of finality which is implicit in all judgments, commands that courts be cautious in exercising the discretion vested in them to reopen proceedings for a new trial." *Id.* (quoting *Ag Pro, Inc. v. Sakraida*, 512 F.2d 141, 143 (5th Cir. 1975), *rev'd on other grounds*, 425 U.S. 273 (1976)). "The purpose of the rule is to afford parties relief

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[2] The court had earlier entered summary judgment in favor of defendant City of Dallas.

from judgments which are unfairly obtained, not those which may be factually incorrect." *Government Fin. Servs. One Ltd. Partnership v. Peyton Place, Inc.*, 62 F.3d 767, 772 (5th Cir. 1995) (quoting *Diaz v. Methodist Hosp.*, 46 F.3d 492, 496 (5th Cir. 1995)).

"A party making a Rule 60(b)(3) motion must establish by clear and convincing evidence (1) that the adverse party engaged in fraud or other misconduct and (2) that the misconduct prevented the party from fully and fairly presenting his case." *Government Fin. Servs.*, 62 F.3d at 772 (quoting *Washington*, 916 F.2d at 1039, and *Montgomery v. Hall*, 592 F.2d 278, 278-79 (5th Cir. 1979)). A party may engage in Rule 60(b)(3) misconduct "if he fails to disclose evidence he knows about and the production of such evidence was clearly called for 'by any fair reading of the discovery order.' " *Government Fin. Servs.*, 62 F.3d at 772-73 (quoting *Montgomery*, 592 F.2d at 279).

B

1

The Janiks allege that AMICA presented trial evidence regarding consumer satisfaction. They must first show that the conduct about which they complain constitutes fraud or misconduct under Rule 60(b)(3). Although they contend that AMICA did not disclose this evidence during discovery, they have not established that they ever requested the information. *See* Ps. Mot. at 2-3. They simply aver that AMICA did not produce the documents "despite related proper discovery requests." *Id.* at 2; Ps. br. at 2. Absent proof of a specific request and the withholding of responsive discovery, however, plaintiffs are

not entitled to relief. *See Chrysler Corp. v. Superior Dodge, Inc.*, 83 F.R.D. 179, 195-96 (D. Md. 1979). The court holds that they have failed to meet their burden of showing that AMICA engaged in misconduct regarding evidence of consumer satisfaction.[3]

Additionally, although to obtain Rule 60(b)(3) relief the Janiks need not prove that the outcome of the trial would have been different absent the defendants' alleged misconduct, they must show that the misconduct prevented them from fully and fairly presenting their case. *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1339 (5th Cir. 1973). The Janiks have not met this burden. They concede that they "could have provided impeachment evidence at trial, regarding customer complains against AMICA." Ps. Mot. at 3 n.4. They appear to argue that they did not want "to use their precious Court-meted-out trial minutes" for this purpose. *Id.* They have failed reasonably to argue that the alleged withholding of such information prevented them from a full and fair presentation of their case because they not only maintain that they had impeachment evidence at trial, but also concede that they opted not to use it.

---

[3] Plaintiffs appear to argue in their reply brief that disclosure was mandated by Rule 26(a)(1) and/or this court's Civil Justice Expense and Delay Reduction Plan. *See* Ps. Rep. Dr. at 3. Rule 26(a)(1), however, requires, in relevant part, that a party disclose matters that are "relevant to disputed facts alleged with particularity in the pleadings[.]" *See* Rule 26(a)(1)(A) and (B). The Janiks do not cite where in their complaint they alleged with particularity a disputed fact that would have required such production. Nor have they cited a specific provision of the court's Civil Justice Expense and Delay Reduction Plan that would have required such disclosure.

2

The Janiks assert that IAS/Nobel committed "wasteful deception and prejudicial confusion about 'who IAS is/was.' " They have failed to show by clear and convincing evidence that IAS/Nobel committed any misconduct. According to the Janiks, they were confused by the complicated chronology that defendants provided them. They maintain that David Terry's ("Terry's") testimony that IAS in this case referred to IAS Claim Services reveals deceit on the part of IAS/Nobel. Ps. Mot. at 5. Any differences between defendants' chronology, *see* ps. Mot. Ex. B., and Terry's testimony do not suffice to meet their Rule 60(b)(3) burden. *See Washington,* 916 F.2d at 1039 (holding that conflicting testimony does not constitute clear and convincing evidence of fraud under rule 60(b)(3)). And the Janiks have not in any event shown that this difference prevented them from fully and fairly presenting their case. Nothing precluded them from cross-examining Terry regarding any alleged inconsistencies between the IAS/Nobel corporate history and Terry's interpretation of "who IAS is/was."

3

The Janiks also maintain that defendants committed misconduct by withholding critical re-cap notes. Ps. Mot. at 6. They have failed to show that they were prevented from fully and fairly presenting their case. They obtained the notes almost one year prior to trial and their expert discussed the notes in his supplemental report. *See* AMICA Resp. Ex. C. at ¶ 11a.

4

The Janiks contend that defendants failed to produce documents relating to their demands for a "100% germ-free" cleaning. They have not shown that they requested documents relating to their germ-free demands.[4] More important, they have not established that any such documents even exist. They have failed to establish that defendants engaged in misconduct.[5]

5

Plaintiffs have not demonstrated that any documents existed regarding generally acceptable claims handling practices or AMICA's policy of giving "the benefit of the doubt to the insured." Without a showing that these documents exist, the Janiks cannot demonstrate that defendants improperly withheld them. Such standards can be followed in an industry without generating documents that are within the possession, custody, or control of a party.

6

Finally, the Janiks contend that defendants' expert's testimony strayed from his report. This cannot possibly

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[4] Plaintiffs advert to "Rule 26." *See* Ps. Mot. at 7; Ps. Br. at 3. Yet, as the court explains *supra* at note 3, they do not cite where in their complaint they alleged with particularity a disputed fact that would have required such production.

[5] If the Janiks' point is that no such documents in fact existed, then that was a matter for trial impeachment, not for a post judgment Rule 60(b)(3) motion.

serve as a basis for relief under rule 60(b)(3), especially since they had the opportunity to, and did, raise this assertion by trial objection. If the expert testified improperly, the court erred reversibly in overruling the objection, and plaintiffs properly preserved error, the appellate court can correct the error on appeal.

* * *

Plaintiffs' motion for relief under 60(b)(3) is denied.[6]

SO ORDERED.

October 28, 1999.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES
DISTRICT JUDGE

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[6] Plaintiffs' request for oral argument is denied. *See* N.D. Tex. Civ. R. 7.1(g).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST A. JANIK, JR, et al.,	§	
Plaintiffs,	§	Civil Action No.
VS.	§	3:95-CV-2594-D
CITY OF DALLAS, et al.,	§	
Defendants.	§	

ORDER

(Filed Nov. 15, 1999)

(Doc #448, entered Nov. 16, 1999)

Plaintiffs' November 15, 1999 motion to reconsider is denied.

SO ORDERED.

November 15, 1999.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST A. JANIK, JR., et al.,	§	Civil Action No.
	§	3:95-CV-2594-D
Plaintiffs,	§	
	§	
VS.	§	
	§	
CITY OF DALLAS, et al.,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

(Filed Oct. 28, 1999)

(Doc #442, entered Oct. 29, 1999)

Plaintiffs Ernest A. Janik, Jr., et al. ("the Janiks") move pursuant to Fed. R. Civ. P. 60(b)(3) for relief from judgment, contending that defendants AMICA Mutual Insurance Company ("AMICA"), and Nobel Service Corporation and IAS Claims Services, Inc. ("IAS") ("the IAS/Nobel defendants"), engaged in misconduct by withholding requested discovery and by utilizing expert testimony that exceeded the scope of the expert's report. The court denies the motion.[1]

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Plaintiffs sued various defendants arising from an incident in which sewage backed up into their leased

[1] Despite the pendency of consolidated appeals in this case, the court has jurisdiction to deny this motion.

home. They alleged *inter alia* claims for breach of contract, bad faith insurance practices, negligence, gross negligence, civil conspiracy and violations of the Texas Insurance Code. Following a jury trial, the court entered judgment in defendants' favor.[2]

Plaintiffs maintain that defendants committed misconduct by (1) withholding information relevant to customer satisfaction with AMICA, (2) perpetrating wasteful deception and prejudicial conclusion about who IAS is or was, (3) withholding critical re-cap notes, (4) failing to produce any documents indicating that the Janiks had demanded a "100% germ-free" cleaning of their property, (5) failing to produce any documents defining or describing what are "generally acceptable claim handling practices" (and by AMICA's failing to produce any documents that opined, advertised, or objectively demonstrated that it routinely gave the benefit of the doubt to an insured's disputed claim), and (6) utilizing expert testimony that strayed from the expert's Rule 26 report. Ps. Mot. at 2-10.

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The Janiks allege that AMICA presented trial evidence regarding consumer satisfaction. They must first show that the conduct about which they complain constitutes fraud or misconduct under Rule 60(b)(3). Although they contend that AMICA did not disclose this evidence during discovery, they have not established that they ever requested the information. *See* Ps. Mot. at 2-3. They simply aver that AMICA did not produce the documents

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Additionally, although to obtain Rule 60(b)(3) relief the Janiks need not prove that the outcome of the trial would have been different absent the defendants' alleged misconduct, they must show that the misconduct prevented them from fully and fairly presenting their case. *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1339 (5th Cir. 1973). The Janiks have not met this burden. They concede that they "could have provided impeachment evidence at trial, regarding customer complains against AMICA." Ps. Mot. at 3 n.4. They appear to argue that they did not want "to use their precious Court-meted-out trial minutes" for this purpose. *Id.* They have failed reasonably to argue that the alleged withholding of such information prevented them from a full and fair presentation of their case

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because they not only maintain that they had impeachment evidence at trial, but also concede that they opted not to use it.

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Plaintiffs have not demonstrated that any documents existed regarding generally acceptable claims handling practices or AMICA's policy of giving "the benefit of the doubt to the insured." Without a showing that these documents exist, the Janiks cannot demonstrate that defendants improperly withheld them. Such standards can be followed in an industry without generating documents that are within the possession, custody, or control of a party.

---

[4] Plaintiffs advert to "Rule 26." *See* Ps. Mot. at 7; Ps. Br. at 3. Yet, as the court explains *supra* at note 3, they do not cite where in their complaint they alleged with particularity a disputed fact that would have required such production.

[5] If the Janiks' point is that no such documents in fact existed, then that was a matter for trial impeachment, not for a post judgment Rule 60(b)(3) motion.

Finally, the Janiks contend that defendants' expert's testimony strayed from his report. This cannot possibly serve as a basis for relief under rule 60(b)(3), especially since they had the opportunity to, and did, raise this assertion by trial objection. If the expert testified improperly, the court erred reversibly in overruling the objection, and plaintiffs properly preserved error, the appellate court can correct the error on appeal.

* * *

Plaintiffs' motion for relief under Rule 60(b)(3) is denied.[6]

SO ORDERED.

October 28, 1999.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES
DISTRICT JUDGE

---

[6] Plaintiffs' request for oral argument is denied. *See* N.D. Tex. Civ. R. 7.1(g).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST A. JANIK, JR., et al.,	§	Civil Action No. 3:95-CV-2594-D
Plaintiffs,	§	(Entered Nov. 16, 1999)
VS.	§	
CITY OF DALLAS, et al.,	§	
Defendants.	§	

ORDER

(Filed Nov. 19, 1998)

(Doc #419, entered Nov. 19, 1998)

Plaintiffs' November 18, 1998 Fed. R. Civ. P. 60(b) motion is denied. At a minimum, plaintiffs have failed to show that had the re-cap notes been disclosed, this would have had any effect on the jury's findings on plaintiffs' damages claims. Without any damages that are connected to a violation of law, plaintiffs are not entitled to a judgment against defendants. In the court's discretion, it denies the motion.

SO ORDERED.

November 19, 1998

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST A. JANIK, JR., et al.,	§	Civil Action No. 3:95-CV-2594-D
Plaintiffs,	§	
VS.	§	
AMICA MUTUAL INSURANCE COMPANY, et al.,	§	
Defendants.	§	

COURT'S CHARGE TO THE JURY & VERDICT

(Filed Aug. 27, 1998)

MEMBERS OF THE JURY:

Now that you have heard all of the evidence and the argument of counsel, it becomes my duty to give you the instructions of the court concerning the law applicable to this case.

* * *

TEXAS INSURANCE CODE CLAIMS

Plaintiffs allege that defendants violated the Texas Insurance code. To establish this claim, plaintiffs must prove each of the following essential elements of the claim by a preponderance of the evidence.

> *First*, that the defendant in question engaged in an unfair or deceptive act or practice; *and*

Second, that the unfair or deceptive act or practice was a producing cause of plaintiffs' damages.

Each of the practices described below, if committed, is an unfair or deceptive act or practice.

"Producing cause" means an efficient, exciting, or contributing cause that, in a natural sequence, produced the damages complained of, if any. There may be more than one producing cause.

QUESTION NO. 10:

Did plaintiffs prove each of the essential elements of their Texas Insurance Code claim against the defendant in question and with respect to the practice in question?

Instruction: Plaintiffs have the burden of proof. If they have met their burden answer "Yes;" otherwise, answer "No." Answer separately below as to each defendant and each alleged practice.

ANSWER:

* * *

(17) Failing to acknowledge with reasonable promptness pertinent communications with respect to claims arising under the policy;

AMICA	YES
IAS	YES

* * *

Apportionment

QUESTION NO. 13:

What percentage of the responsibility for causing plaintiffs' damages do you find to be attributable to each party listed below?

Instruction: You should only assign percentages to the parties you find caused the damages. The percentages you find must total 100%. The percentages must be expressed in whole numbers. The responsibility attributable to any one named below is not necessarily measured by the number of acts or omissions found.

ANSWER:

AMICA	25	%
IAS	75	%
Plaintiffs	0	%
	TOTAL	100%

DAMAGES

If plaintiffs have proved one or more of their claims, then they are entitled to recover damages, if any. You should not interpret the fact that I am giving you instructions about damages as an indication in any way that I believe that the plaintiffs should, or should not, prevail in this case. I am instructing you on damages only so that you will have guidance in the event you decide that plaintiffs have proved one or more claims for which they are entitled to recover damages.

If you find that plaintiffs have proved such a claim, then you must determine an amount that is fair compensation for these damages. These damages are called compensatory damages, and their purpose is to make the plaintiffs whole – that is, to compensate them for their damages, personal property. However, if defendants establish this defense, these amounts do not affect other types of damages, if any, that plaintiffs prove.

QUESTION NO. 14:

What sum of money, if any, if paid now in cash, do you find would fairly and reasonably compensate plaintiffs for their damages, if any?

> *Instruction*: Plaintiffs have the burden of proof, except that defendants have the burden of proving the damages if any, that plaintiffs could have mitigated. Answer in dollars and cents, if any, as to each element. Consider the elements of damages listed below and none other. Consider each element separately. Do not include damages for one element in any other element. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies your answers at the time of judgment. Do not include interest on any amount of damages you find.

ANSWER:

The out of pocket costs to plaintiffs to replace their sewage-contaminated property, as to those items that cannot be repaired at a cost less than the cost of replacement.

0

The out of pocket costs to plaintiffs to clean plaintiffs' consumer goods, other than those requiring special remediation efforts, as to those items that can be cleaned at a cost less than the cost of replacement.

$2815.73

The foregoing is the unanimous verdict of the jury.

Dated: 27 Aug. 1998

Hollie C. Cash
Presiding Juror

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-11385

ERNEST A JANIK, JR, individually on behalf of Grant Joseph Janik, on behalf of Tyler Newman Janik; LEAH EILEEN JANIK, individually on behalf of Grant Joseph Janik, on behalf of Tyler Newman Janik

Plaintiff - Appellants

v.

CITY OF DALLAS TEXAS, Etc; ET AL

Defendants

AMICA MUTUAL INSURANCE COMPANY, a Rhode Island Company; NOBEL SERVICE CORPORATION, a Delaware Corporation doing business as Insurance Adjustment Services Inc

Defendants - Appellees

Appeal from the United States District Court for the Northern District of Texas, Dallas

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ON PETITION FOR REHEARING

(Filed Feb. 22, 2001)

Before REYNALDO G. GARZA, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST A. JANIK, JR, et al.,	§	
Plaintiffs,	§	Civil Action No.
VS.	§	3:95-CV-2594-D
AMICA MUTUAL INSURANCE COMPANY, et al.,	§	ENTERED ON DOCKET 8/31 PURSUANT TO F.R.C.P. RULES 58 AND 79a
Defendants.	§	

JUDGMENT

(Filed Aug. 27, 1998)

(Doc #394, entered Aug. 28, 1998)

The court entered partial summary judgment in favor of defendants AMICA Mutual Insurance Company ("AMICA"), IAS Claims Services, Inc. ("IAS"), and Nobel Service Corporation ("Nobel") in several memorandum opinions and orders filed in this case. Thereafter, the parties tried the remaining claims to a jury. The court granted judgment as a matter of law as to one claim against defendants IAS and Nobel. The jury returned a verdict in favor of defendants. Accordingly, it is ordered and adjudged that plaintiffs' actions against defendants AMICA, IAS, and Nobel are dismissed with prejudice.

Taxable costs of court, as calculated by the clerk of court, are assessed against plaintiffs.

Done at Dallas, Texas this 27th day of August, 1998.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES DISTRICT
JUDGE

APPENDIX B

U.S. CONSTITUTION AMENDMENTS

5th Amendment (Due Process Clause)

. . . nor shall any person . . . be . . . deprived of life, liberty, or property, without due process of law. . . .

7th Amendment (Trial by Jury Clause)

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

* * *

FEDERAL RULES OF CIVIL PROCEDURE

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY; DUTY OF DISCLOSURE

(a) Required Disclosures; Methods to Discover Additional Matter.

(1) *Initial Disclosures.* Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be labile to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subdivision (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) *Disclosure of Expert Testimony.*

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made

by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

(3) *Pretrial Disclosures.* In addition to the disclosures required in the preceding paragraphs, a party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefore, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the

Federal Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(4) *Form of Disclosures: Filing.* Unless otherwise directed by order or local rule, all disclosures under paragraphs (1) through (3) shall be made in writing, signed, served, and promptly filed with the court.

(5) *Methods to Discover Additional Matter.* Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes: physical and mental examinations; and requests for admission.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(4) *Trial Preparation: Experts.*

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discovery facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) *Claims of Privilege or Protection of Trial Preparation Materials.* When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall

describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the disclosure or discovery not be had;

(2) that the disclosure may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Timing and Sequence of Discovery. Except when authorized under these rules or by local rule, order, or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f). Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Disclosures and Responses. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include

information thereafter acquired if ordered by the court or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party leans that in some material respect, the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 26(a)(3) are due.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(f) Meeting of Parties; Planning for Discovery. Except in actions exempted by local rule or when otherwise ordered, the parties shall, as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by subdivision (a)(1), and to develop

a proposed discovery plan. The plan shall indicate the parties' views and proposals concerning:

(1) What changes should be made in the timing, form, or requirement for disclosures under subdivision (a) or local rule, including a statement as to when disclosures under subdivision (a)(1) were made or will be made;

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(4) any other orders that should be entered by the court under subdivision (c) or under Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 10 days after the meeting a written report outlining the plan.

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections.

(1) Every disclosure made pursuant to subdivision (a)(1) or subdivision (a)(3) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address.

The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sing the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:

> (A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;
>
> (B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and
>
> (C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request,

response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

[Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; March 30, 1970, effective July 1, 1970; April 29, 1980, effective August 1, 1980; April 28, 1983, effective August 1, 1983; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993.]

* * *

RULE 56. SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to

the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

[Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; March 2, 1987, effective August 1, 1987.]

* * *

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other

misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28. U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

[Amended December 27, 1946, effective March 19, 1948; December 29, 1948, effective October 20, 1949; March 2, 1987, effective August 1, 1987.]

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

ERNEST A. JANIK, JR., individually; and wife, LEAH EILEEN JANIK, individually; and ERNEST A. JANIK, JR., and wife LEAH EILEEN JANIK, as the Parents and Next Friends of their Minor Children, GRANT JOSEPH JANIK and TYLER NEWMAN JANIK;	FILED DEC 14 1999
plaintiffs,	CIVIL ACTION
v.	**No. 3:95-CV-2594-D**
AMICA MUTUAL INSURANCE COMPANY; NOBEL SERVICE CORPORATION; and IRS CLAIM SERVICES, INC.,	(Doc #449)
defendants[1]	

PLAINTIFFS' NOTICE OF APPEAL

NOTICE is hereby given that all of the plaintiffs[2] hereby appeal to the United States Court of Appeal for

---

[1] Plaintiffs' suit against the City of Dallas, by virtue of the final Judgment entered 5-28-1998, was severed from the plaintiffs' ongoing lawsuit against the other three defendants (who are AMICA MUTUAL INSURANCE COMPANY; NOBEL SERVICE CORPORATION; and IAS CLAIM SERVICES, INC.).

[2] FRAP Form 1, in conjunction with FRAP Rule 3(c), indicates that it is permissible to identify appellants as "all plaintiffs".

the Fifth Circuit the "Memorandum Opinion and Order" entered in this action on October 29, 1999, and the related one-sentence "order" entered in this action on November 16, 1999, – since by those rulings the trial court:

(a) denied plaintiffs' Post-Transcript Rule 60(b)(3) Motion for Relief from 8-31-1998 Judgment, Due to Misconduct, etc., by AMICA and IAS/NOBEL[3]; and

(b) denied plaintiffs' Motion to Reconsider their Post-Transcript Rule 60(b)(3) Motion for Relief from 8-31-1998 Judgment[4];

Respectfully submitted by:

/s/ James J. S. Johnson
James J. Scofield Johnson, Esq.
Texas Bar No. 10741520
COUNSEL FOR ALL OF THE PLAINTIFFS
Plaza of the Americas,
South Tower
600 N. Pearl Street, Suite #860
Dallas, Texas 75201
817/430-9305 phone;
817/430-9306 FAX

---

[3] Plaintiffs' Post-Transcript Rule 60(b)(3) Motion for Relief was filed August 30, 1999 (with Brief, etc.).

[4] Plaintiffs' Motion to Reconsider their Post-Transcript Rule 60(b)(3) Motion was filed November 15, 1999 (with Brief, etc.); – the Order denying said motion was signed on the same afternoon it was filed (and entered the next day).

CERTIFICATE REGARDING SERVICE

THIS IS TO CERTIFY THAT copy of the foregoing, with attachments (if any), will have been served on December 14, A.D. 1999, on the below-noted addressees, via FAX, courier, CMRRR, and/or first class U.S. mail, pursuant to the Federal Rules of Appellate Procedure, –

R. Brent Cooper, Esq.
R. Douglas Rees, Esq.
Cooper, Aldous & Scully, P.C.
Founders Square, Suite #100
900 Jackson, Dallas, TX 75202

(counsel for IAS/NOBEL defendants)
if by FAX: 214/712-9540

Marc H. Fanning, Esq.
Timothy King Fifer, Esq.
Cathlynn H. Cannon, Esq.
Fanning, Harper & Martinson
3rd Floor, Preston Commons West
8117 Preston Road, Dallas, TX 75225

(counsel for AMICA)
if by FAX: 214/987-9649

/s/ James J. S. Johnson
James J. S. Johnson, Esq.
(CERTIFYING ATTORNEY

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST A. JANIK, JR., individually, and wife, et al.	*	**CIVIL ACTION NO. 395-CV-2594-D**
Plaintiffs,	*	**(Filed Nov. 15, 1999)**
v.	*	**(Doc #447)**
AMICA MUTUAL INSURANCE COMPANY; NOBEL SERVICE CORPORATION; and IAS CLAIM SERVICES, INC.,	*	
Defendants.	*	

JANIK'S SUPPLEMENTAL DECLARATION
verifying discovery abuses, unfair surprises, and other misconduct of defendants, in support of
PLAINTIFFS' MOTION TO RECONSIDER
THEIR POST-TRANSCRIPT RULE 60(b) (3) MOTION FOR RELIEF FROM 8-31-1998 JUDGMENT

TO THE HONORABLE SIDNEY A. FITZWATER, U.S. DISTRICT JUDGE OF PRESIDING OVER SAID COURT:

Plaintiffs hereby submit the attached Supplemental Declaration (as a supplement to the re-submission and re-authorization of the documentation within of Mr. Janik's 11-18-1998-filed declaration), with the attached Supplemental Declaration being declared by one of the plaintiffs in support of the plaintiffs' MOTION TO RECONSIDER THEIR RULE 60(b) (3) POST-TRANSCRIPT MOTION FOR RELIEF

FROM JUDGMENT, which motion for reconsideration is largely based upon issues raised in this honorable Court's MEMORANDUM OPINION AND ORDER signed 10-28-1999 and entered on 10-29-1999 (and, regarding which 10-38/28-1999 ruling, the Janiks now seek reconsideration).

Respectfully submitted by:

/s/ James J. S. Johnson
James J. S. Johnson, Esq.
Texas Bar No. 10741520
Plaza of the Americas, South
Tower #860
600 N. Pearl Street, Dallas, TX 75201
metro 817/430-9305 new telephone;
metro 817/430-930-9306 new FAX
COUNSEL FOR THE PLAINTIFFS/MOVANTS

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST A. JANIK, JR., individually, and wife, Leah Eileen Janik, individually; and ERNEST A. JANIK, JR. & wife Leah Eileen Janik, as parents and next friends of their minor children, GRANT JOSEPH JANIK and TYLER NORMAN JANIK; *Plaintiffs,* v. AMICA MUTUAL INSURANCE COMPANY; NOBEL SERVICE CORPORATION; and IAS CLAIM SERVICES, INC., *Defendants.*	**CIVIL ACTION NO. 395-CV-2594-D** **ORAL ARGUMENT REQUESTED**

JANIK'S 11-14-1999 SUPPLEMENT TO HIS 11-18-1998 DECLARATION, IN SUPPORT OF PLAINTIFFS' MOTION TO RECONSIDER RULE 60(B) (3) RELIEF

"I, ERNEST A. JANIK, JR., as one of the plaintiffs in the above-noted litigation. I hereby declare and state the following facts upon my personal knowledge, and my declaration stated hereinbelow is true and correct, and I hereby make this declaration pursuant to 28 U.S.C. § 1746, under penalty of perjury:

A.

A true and correct copy of my file-marked copy of my Declaration filed 11-18-1998 is to be re-submitted for review (with a separate authentication declaration, via filing on 11-15-1999, i.e., to be filed contemporaneously herewith), i.e., for reconsideration by the above-noted Court as support for plaintiffs' Rule 60(B) (3) Motion filed on 8-30-1999 (which plaintiffs now seek reconsideration of).

B.

Accordingly, I hereby provide supplemental documentation and/or attention to various documents showing the basis of plaintiffs' Rule 60(b) (3) Motion, as well as verified statements regarding how the plaintiffs' ability to fully and fairly present their case at trial was hindered by various discovery abuses, unfair surprises, and other misconduct by AMICA and the IAS/NOBEL defendants.

C.

The attached documents are authenticated copies and the following statements made regarding such documents are hereby verified by me as being true and correct and according to my personal knowledge (which is based upon my personal review of the respective pleadings and discovery-related papers identified by me hereinafter).

D.

As the attached documentation indicates (in conjunction with the verified documentation within my 11-18-1998-

filed Declaration, which is incorporated by reference herein), the plaintiffs in this case (my family) have been unfairly prejudiced in this litigation by combined effect of many *discovery abuses, unfair surprises, and other misconduct* of AMICA and the IAS/NOBEL defendants, such that our ability, as plaintiffs, to fully and fairly present their case at trial was hindered in a manner that prejudiced plaintiffs' trial preparations and trial approach, as is more fully shown by the attachments indexed and attached herein (all of which attached papers are genuine copies of my original copies thereof).

E.

To assist the court, the documentation specifically provided by this Supplemental Declaration is organized, topically, as shown by the following alphabetically-indexed outline:

INDEX OF TOPICALLY TABBED CONTENTS

Janik's 11-14-1999 SUPPLEMENTAL DECLARATION's Introduction & Overview, w/ summaries & index-cites to misconduct's trial preparation impact (*i.e., influence on plaintiffs*), as per the "sabotage" of "federal trial machinery" issues raised in *Rozier v. Ford Motor Co.*, 573 F.2d 1322, 1341-1346 (5th Cir. 1978) (re Rule 60(b) (3)'s policy)

A. "ACTIVELY CONCEAL"/"ACTIVELY WITHHOLD" – CHRONOLOGY OF RE-CAP

A-1: 12-6-1996 RULE 34 REQUEST TO IAS/NOBEL FOR RE-CAP NOTES;

A-2: 1-6-1997 ORIGINAL DEADLINE FOR ALL RULE 26(a) (2) REPORTS;

A-3: 1-24-1997 IAS/NOBEL ATT'Y CLAIMS RE-CAP PRIVILEGED;

A-4: 3-10-1997 AMICA OPPOSES SUBPOENAED EXPERT DOCS w/ RECAP;

A-5: 3-13-1997 IAS OPPOSES SUBPOENAED EXPERT DOCS w/ RECAP;

A-6: 8-25-1997 IAS SAYS "MOST" EXPERT DOCS ALREADY PRODUCED;

A-7: 8-27-1997 AMICA SAYS EXPERTS HAVE NO UNPRODUCED DOCS;

A-8: week of 9-2-1997: *JANIKS FOR FIRST TIME SEE RE-CAP – BY VIRTUE OF USING RULE 45 SUBPOENAS TO SEE AND COPY FILES OF TRIAL EXPERTS QUINN, SHUMAKER, & SANDERS!*

B. ***[not used]***

C. CUSTOMER SATISFACTION (*"GIVE BENEFIT OF DOUBT"*)

C-1: COMPLAINT PAGES SHOWING DISPUTED TOPIC;

C-2: PAGES OF TESTIMONY SURPRISES NOT PRODUCED BY DISCLOSURE;

C-3: PAGES OF PAPER DISCOVERY REQUESTING INFO ON THAT TOPIC, - WITH NON-RESPONSIVE/EVASIVE ANSWERS ON THAT TOPIC;

C-4: PAGES OF UNFAIR JURY ARGUMENT ON THAT TOPIC

D. DECEPTIVE DOCUMENTATION OF CLAIMS HANDLING

(e.g., suggesting Janiks demanded "100% germ-free")

D-1: COMPLAINT PAGES SHOWING DISPUTED TOPIC;

D-2: PAGES OF TESTIMONY SURPRISES NOT PRODUCED BY DISCLOSURE;

D-3: PAGES OF PAPER DISCOVERY REQUESTING INFO ON THAT TOPIC, – WITH NON-RESPONSIVE/EVASIVE ANSWERS ON THAT TOPIC;

D-4: PAGES OF UNFAIR JURY ARGUMENT ON THAT TOPIC

E-F [*not used*]

G **"GENERALLY ACCEPTED CLAIMS HANDLING PRACTICES"**

G-1: COMPLAINT PAGES SHOWING DISPUTED TOPIC;

G-2: PAGES OF TESTIMONY SURPRISES NOT PRODUCED BY DISCLOSURE;

G-3: PAGES OF PAPER DISCOVERY REQUESTING INFO ON THAT TOPIC, – WITH NON-RESPONSIVE/EVASIVE ANSWERS ON THAT TOPIC;

G-4: PAGES OF UNFAIR JURY ARGUMENT ON THAT TOPIC

H [*not used*]

I **"IAS":** ***"WHO IS/WAS 'IAS'?"***

I-1: COMPLAINT PAGES SHOWING DISPUTED TOPIC;

I-2: PAGES OF TESTIMONY SURPRISES NOT PRODUCED BY DISCLOSURE;

I-3: PAGES OF PAPER DISCOVERY REQUESTING INFO ON THAT TOPIC, – WITH NON-RESPONSIVE/EVASIVE ANSWERS ON THAT TOPIC;

I-4: PAGES OF UNFAIR JURY ARGUMENT ON THAT TOPIC

J-K [*not used*]

L **LIVE PLEADINGS** (parts of **Janik's 3RD AMENDED COMPLAINT**), relevant for recognizing required Rule 26(a) (1) productions

M [*not used*]

N [*not used*]

O [*not used*]

P-A **PROPOUNDED DISCOVERY TO AMICA, – WITH EVASIVE RESPONSES** (examples of obstructionist discovery tactics by AMICA; claiming privilege to resist producing re-cap notes, etc., on dates after re-cap notes used by AMICA's trial experts)

P-I **PROPOUNDED DISCOVERY TO IAS/NOBEL, – with EVASIVE RESPONSES** (examples of obstructionist discovery tactics by IAS/NOBEL; claiming privilege to resist producing re-cap notes, etc., on dates after re-cap notes used by IAS/NOBEL's trial experts)

Q **QUINN'S EXPERT REPORT**

R **REPUTATION DECEPTION ("#1 CONSUMER RATINGS")**

- R-1: COMPLAINT PAGES SHOWING DISPUTED TOPIC;
- R-2: PAGES OF TESTIMONY SURPRISES NOT PRODUCED BY DISCLOSURE;
- R-3: PAGES OF PAPER DISCOVERY REQUESTING INFO ON THAT TOPIC, – WITH NON-RESPONSIVE/EVASIVE ANSWERS ON THAT TOPIC;
- R-4: PAGES OF UNFAIR JURY ARGUMENT ON THAT TOPIC

S
- S-1: **SANDERS'** EXPERT REPORT
- S-2: **SHUMAKER'S** EXPERT REPORT
- S-3: **SEIDENFELD'S** EXPERT REPORT

T-W [*not used*]

X **CROSS-REFERENCES TO JANIK'S 11-18-1998 DECLARATION**

Y-Z [*not used*]

F.

Plaintiffs would have prepared differently for trial, and would have modified our trial approach (as well as our

approach to the multiple waves of summary judgment motions in this case, by which our DTPA claims were struck etc.), – if plaintiffs would have had the benefit of various document productions that were *not* timely provided (such as AMICA and IAS/NOBEL documents requested via informal and formal document production requests) or which, to date, have *never* been provided. For example, prejudicial delays in receiving discovery mandated documents harmed plaintiffs' ability to provide such documents to plaintiffs' experts (timely), so that plaintiffs' experts could fairly utilize those documents in pre-trial and trial activities. Also, prejudicial delays (and/or ongoing denials/withholdings/concealments) regarding discovery-mandated documents have harmed plaintiffs' ability to prepare for trial including preparation of cross examination approaches and including budgeting court-limited trial minutes.

G.

Moreover, I stand ready, willing, and able to testify in an evidentiary hearing, if one would be granted (in conjunction with an occasion for oral argument), to verify before this Court that (and how) the plaintiffs were prevented from fully and fairly presenting their case in this litigation, due to the discovery abuses (which discovery abuses include obstructionist tactics that unreasonably increased my litigation costs in this case), unfair surprises, and other misconduct of AMICA and the IAS/NOBEL parties.

Signed & verified this 14th day of November, A.D. 1999.

/s/ Ernest A. Janik Jr.
ERNEST A. JANIK, JR.,
one of the plaintiffs/movants

*See the following pages for specific descriptions and impacts that illustrate how defendant's misconduct harmed Plaintiffs' trial preparations and trial approaches.

AMICA'S "CONSUMER RATINGS"

1. See my 11-18-1998 Declaration and its underlying support, including specific examples and contrary evidence that would have been used by plaintiffs at trial:
   a) page 5, ¶ 1(m)
   b) page 7, ¶ 2a
   c) page 10, ¶ 3i
   d) Tab K (all pages)
   e) Tab J (all pages)
   f) Tab P, page P-1, ¶ 5
   g) Tab R, page R-1, ¶ 4
   h) Tab T, page T-1, ¶¶ 3 & 9

2. Plaintiffs and plaintiffs' experts would have provided contrary testimony and exhibits regarding plaintiffs' exhibits PX 431, PX 432, PX 433 – which involve over 1,200 pages of actual complaints filed against AMICA, with the TEXAS DEPARTMENT OF INSURANCE, including plaintiffs' exhibit PX 719, which is a summary of these consumer complaints. PX 719 also identifies those claims involving the same persons who were involved in the Janik matter: Mr. Tom Ferris (of AMICA); Mr. Myles Walsh (of AMICA); Mr. David Terry (of IAS); Mr. Jene Montague (of IAS); among others.

3. Had this (i.e., AMICA's supposed #1 "consumer rating") been disclosed prior to trial, plaintiffs would have researched the criteria used, compared such criteria to defendants' behavior with the Janiks, and provided the related testimony – including independent & objective opinions from plaintiffs' trial experts (Mr. Tom Veitch and Mr. Bob Lazarus).

4. Additionally, plaintiffs would have used the above information in plaintiffs' responses opposing the defendants' various motions for summary judgment, and plaintiffs would have used the above information in declarations filed in support of plaintiffs' responses (opposing the defendants' various motions for summary judgment), – including those summary judgment motions that involved plaintiffs' DTPA claims and economic coercion claims.

5. This trial surprise (i.e, about AMICA supposedly having #1 "consumer ratings" every year) does not appear to be disclosed anywhere within the following documents:

   a) AMICA's Rule 26 disclosure;
   b) IAS/NOBEL's Rule 26 disclosure;
   c) AMICA's claim file (trial exhibit A-1, including pages numbered between Bates #A000003 to #A001649, which file contained pages that did not contain or match all of those Bates range numbers);
   d) IAS/NOBEL's claim file (trial exhibit DX 1), including pages numbered between Bates #I00002 to #I00950, which file contained pages that did not contain or match all of those Bates range numbers);
   e) defendants' trial exhibits.

AMICA'S "BENEFIT OF THE DOUBT" PRACTICE

1. See my 11-18-1998 DECLARATION and its underlying support, including specific examples and contrary evidence that would have been used by plaintiffs at trial:
   a) page 3, ¶ 1(a)
   b) page 7, ¶¶ 2b & 2f
   c) page 8, ¶¶ 2f & 3a
   d) page 9, ¶ 3g
   e) page 12, ¶2q
   f) Tab F, ¶ F4
   g) Tab J, all pages
   h) Tab K, all pages
   i) Tab P, ¶ 2
   j) Tab Q, ¶ 2
   k) Tab R, ¶¶ 7 & 8
   l) Tab T, ¶¶ 2, 7, 8, 13, 14, 12, & 8
   m) Tab U, ¶ 3
   n) Tab W, ¶¶ W8 to W11
2. Plaintiffs and plaintiffs' experts would have provided numerous examples of contrary evidence including AMICA's failure to pay the policy limit on additional living expenses ("ALE"), despite the insured's documentation of expenses that exceeded the policy limit (for ALE).
3. This trial surprise (i.e, about AMICA supposedly having a practice of giving their insureds the "benefit of the doubt") does not appear to be disclosed anywhere within the following documents:
   a) AMICA's Rule 26 disclosure;
   b) IAS/NOBEL's Rule 26 disclosure;
   c) AMICA's claim file (trial exhibit A-1, including pages numbered between Bates #A000003 to #A001649, which file contained pages that did not

contain or match all of those Bates range numbers);

d) IAS/NOBEL's claim file (trial exhibit DX 1), including pages numbered between Bates #I00002 to #I00950, which file contained pages that did not contain or match all of those Bates range numbers);

e) defendants' trial exhibits.

AMICA'S & IAS/NOBEL'S "100% GERM-FREE" ACCUSATION

1. SEE MY 11-18-1998 DECLARATION and its underlying support, including specific examples and contrary evidence that would have been used by plaintiffs at trial:
   a) page 5, ¶ 1(1)
   b) page 7, ¶ 2c
   c) page 9, ¶ 3e
   d) Tab G, all pages
   e) Tab N, ¶¶ N7, N3, & N4
   f) Tab O, (regarding IAS/NOBEL), ¶¶ O13 & O14
   g) Tab P, ¶ 1
   h) Tab Q, ¶ 3
   i) Tab R, ¶ 6
   j) Tab T, ¶¶ 5 & 6
2. Plaintiffs would have testified that subpoenaed Blackmon Mooring records PX 435, PX 436, and PX 437 contained no evidence supporting this surprise (i.e., AMICA's and IAS/NOBEL's "100% germ-free" accusation).

3. Plaintiffs would have, on direct examination, provided contrary evidence with plaintiffs' witness Greg Upah, who was qualified to testify as an expert witness and a fact witness.
4. Plaintiffs and plaintiffs' insurance experts (Mr. Tom Veitch and Mr. Bob Lazarus) could have testified about contrary evidence to this surprise (i.e., AMICA's and IAS/NOBEL's "100% germ-free" accusation).
5. This trial surprise (i.e, AMICA'S and IAS/NOBEL'S "100% germ-free" accusation) does not appear to be disclosed anywhere within the following documents:

   a) AMICA's Rule 26 disclosure;
   b) IAS/NOBEL's Rule 26 disclosure;
   c) AMICA's claim file (trial exhibit A-1, including pages numbered between Bates #A000003 to #A001649, which file contained pages that did not contain or match all of those Bates range numbers);
   d) IAS/NOBEL's claim file (trial exhibit DX 1), including pages numbered between Bates #I00002 to #I00950, which file contained pages that did not contain or match all of those Bates range numbers);
   e) defendants' trial exhibits.

DR. SEIDENFELD'S MEDICAL TESTIMONY AT TRIAL

1. See my 11-18-1998 DECLARATION and its underlying support, including specific examples and contrary evidence that would have been used by plaintiffs at trial:

a) page 3, ¶ 1(b)
b) page 11, ¶ 3n
c) Tab S, all pages
d) Tab D, all pages
e) Tab I, all pages

2. Had this (i.e., Dr. Seidenfeld's expanding his Rule 26 expert report's "no infectious diseases" opinion into a "no sickness at all" opinion) been disclosed prior to trial testimony, plaintiffs would have used a trial approach involving some combination of the following: obtained contrary trial testimony from the Janik family's doctors, from plaintiffs' medical expert (Dr. David Brandon), and from the plaintiffs.
3. Plaintiffs' medical expert (Dr. David Brandon) would have been asked preemptive questions, on direct about sicknesses that do not involve "infectious disease" (i.e., "no infections" "not sick at all").
4. This trial surprise (i.e., i.e., Dr. Seidenfeld's expanding his Rule 26 expert report's "no infectious diseases" opinion into a "no sickness at all" opinion) does not appear to be disclosed anywhere within the following documents:
   a) AMICA's Rule 26 disclosure;
   b) IAS/NOBEL's Rule 26 disclosure;
   c) Dr. Seidenfeld's Rule 26 expert report;
   d) defendant's trial exhibits.

GENERALLY ACCEPTED CLAIMS HANDLING POLICIES & PROCEDURES"

1. See my 11-18-1998 DECLARATION and its underlying support, including specific examples and contrary evidence that would have been used by plaintiffs at trial:
   a) page 6, ¶¶ 1(p) & 1(q)
   b) page 7, ¶¶ 2b & 2e
   c) page 8, ¶ 2g
   d) page 9, ¶ 3d
   e) page 4, ¶ 1(i)
   f) page 10, ¶ 3j
   g) page 11, ¶¶ 31 & 3m
   h) page 13, ¶¶ 4a & 4b
   i) page 14, ¶ 4d
   j) Tab M, pages M1 & M2, ¶¶ 1, 2, 3, 4, 5 & 8
   k) Tab N, page N1, ¶¶ N11, N12, N13, N14, & N6
   l) Tab O, (regarding IAS), page 01, ¶¶ 08 & 04
   m) Tab P, pages P1 & P2, ¶¶ 3, 6 & 4
   n) Tab Q, pages Q1 & Q2, ¶¶ 5 & 1
   o) Tab R, page R1, ¶¶ 4, 17, & 18
2. Had this (i.e., that AMICA's and IAS/NOBEL's witnesses would provide trial opinion purportedly based on "generally accepted claims handling practices", *which supposed standard was never produced in written form prior to or at trial*), plaintiffs and plaintiffs' experts would have reviewed defendants' claims handling policies and procedures in order to evaluate

defendants' compliance regarding defendants' behavior and regarding the actions taken with respect to the Janiks, etc.

3. Plaintiffs' experts could have provided expert opinion testimony as to whether AMICA's policies and procedures, and/or as to whether IAS/NOBEL's policies and procedures, were in fact "generally accepted" standards for claims handling practices.
4. This trial surprise (i.e, that AMICA's and IAS/NOBEL's witnesses would provide trial opinion purportedly based on "generally accepted claims handling practices") does not appear to be disclosed anywhere in the following documents:
   a) AMICA's Rule 26 disclosure;
   b) IAS/NOBEL's Rule 26 disclosure;
   c) AMICA's claim file (trial exhibit A-1, including pages numbered between Bates #A000003 to #A001649, which file contained pages that did not contain or match all of those Bates range numbers);
   d) IAS/NOBEL's claim file (trial exhibit DX 1), including pages numbered between Bates #I00002 to #I00950, which file contained pages that did not contain or match all of those Bates range numbers);
   e) defendants' trial exhibits.
5. Had the defendants' claims handling policies and procedures been timely disclosed and produced (as alleged at trial as being "generally accepted"), plaintiffs and plaintiffs' experts would have provided declarations in opposition, – and/or plaintiffs' experts would have timely provided Rule 26 expert report conclusions, than more than likely (if not most likely)

would have supported plaintiffs' claims against the defendants, including plaintiffs' claims for DTPA, economic coercion, undue influence, among others.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST A. JANIK, JR., individually; and wife, et al. Plaintiffs, v. AMICA MUTUAL INSURANCE COMPANY; NOBEL SERVICE CORPORATION; and IAS CLASS SERVICES, INC., Defendants.	*	CIVIL ACTION No. 395-CV-2594-D (Filed Nov. 15, 1999) (Doc #446)

JANIK's AUTHENTICATION DECLARATION
authenticating a pre-transcript declaration, in support of PLAINTIFFS' MOTION TO RECONSIDER THEIR POST-TRANSCRIPT RULE 60(b)(3) MOTION FOR RELIEF FROM 8-31-1998 JUDGMENT

TO THE HONORABLE SIDNEY A. FITZWATER, U.S. DISTRICT JUDGE OF PRESIDING OVER SAID COURT:

Plaintiffs hereby submit the attached authentication Declaration (*regarding the authentication of a 11-18-1998-filed declaration*), as declared by one of the plaintiffs in support of the plaintiffs' MOTION TO RECONSIDER THEIR RULE 60(b)(3) POST-TRANSCRIPT MOTION FOR RELIEF FROM JUDGMENT, which motion for reconsideration is largely based upon issues raised in this honorable Court's MEMORANDUM OPINION AND ORDER signed 10-28-1999 and entered on

10-29-1999 (*and, regarding which 10-28/29-1999 ruling, the Janiks now seek reconsideration*).

Respectfully submitted by:

/s/ James J. S. Johnson
James J. S. Johnson, Esq.
Texas Bar No. 10741520
Plaza of the Americas,
South Tower #860
600 N. Pearl Street, Dallas,
TX 75201
metro 817/430-9305
new telephone;
metro 817/430-9306 new FAX
COUNSEL FOR THE
PLAINTIFFS/MOVANTS

JANIK's DECLARATION authenticating 11-18-1998 DECLARATION

"I, ERNEST A. JANIK, JR., am one of the plaintiffs in the above-noted litigation. I hereby declare and state the following facts upon my personal knowledge, and my declaration stated hereinbelow is true and correct, and I hereby make this declaration pursuant to 28 U.S.C. § 1746, under penalty of perjury:

A.

Attached hereto, for reconsideration by the above-noted Court, is a copy of my file-marked copy of my Declaration filed 11-18-1998.

B.

It is my understanding that my 11-18-1998-filed Declaration was likely not accessible (*or was not readily accessible*) to this Court during October 1999 – due to the Court's file being in the custody of the Fifth Circuit Court of Appeal. However, during October 1999 plaintiffs filed a Rule 60(b)(3) Motion that referred to (and relied in part upon) my 11-18-1998-filed Declaration.

C.

Since it appears likely that my 11-18-1998-filed Declaration was originally considered by Rule 60(b)(2) standards[1] – as opposed to Rule 60(b)(#) standards – so we plaintiffs are now re-submitting a copy of my 11-18-1998-filed Declaration, *so that this Court may reconsider the meritorious documentation verified and authenticated within my 11-18-1998 Declaration,* for Rule 60(b)(3) purposes.

D.

Accordingly, I hereby authenticate the attached indexed photocopy of my 11-18-1998 as a true and correct copy of my file-marked copy of my 11-18-1998-filed Declaration."

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[1] This legal conclusion has been asserted by plaintiffs' counsel (*on whom I have relied for this inference*) via "PLAINTIFFS' BRIEF SUPPORTING THEIR POST-TRANSCRIPT RULE 60(B)(3) MOTION FOR RELIEF FROM THE 8-31-1998-ENTERED JUDGMENT, DUE TO MISCONDUCT OF AMICA AND THE IAS/NOBEL DEFENDANTS" (filed August 30, 1999), page 6, ¶ 11, which ¶11 specifically quotes from this honorable Court's ORDER signed & entered on 11-19-1998.

Signed & verified this 14th day of November, A.D. 1999.

/s/ Ernest A. Janik, Jr.
ERNEST A. JANIK, JR.,
one of the plaintiffs/movants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST A. JANIK, JR., individually, and wife, LEAH EILEEN JANIK, individually, and ERNEST A. JANIK, JR., and wife LEAH EILEEN JANIK, as parents and next friends of their minor children, GRANT JOSEPH JANIK and TYLER NORMAN JANIK; plaintiffs,	*	CIVIL ACTION No. 395-CV-2594-D
v.	*	(FILED 11/18/1998)
AMICA MUTUAL INSURANCE COMPANY; NOBEL SERVICE CORPORATION; and IAS CLAIM SERVICES, INC., defendants.	*	(Doc #418)

JANIK DECLARATION
supporting Rule 60(b) Motion
for relief from judgment,
due to unfair surprises, etc.
caused by
AMICA MUTUAL INSURANCE COMPANY
and/or the IAS/NOBEL defendants

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiffs hereby come and submit this Declaration of one of the plaintiffs in support of their Rule 60(b) Motion for Relief from Judgment, due to unfair surprises, etc. caused by AMICA MUTUAL INSURANCE COMPANY, and/or

by the IAS/NOBEL defendants, as follows by the attachment hereto.

Respectfully submitted by:

/s/ James J. S. Johnson
James J. S. Johnson, Esq.
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COUNSEL FOR
THE PLAINTIFFS

JANIK DECLARATION
regarding
UNFAIR SURPRISES, MISREPRESENTATIONS, AND THE LIKE,
caused by AMICA MUTUAL INSURANCE COMPANY
and/or by the IAS/NOBEL defendants

I, **ERNEST A. JANIK, JR.**, am one of the plaintiffs in the above-noted litigation. I hereby declare and state the following facts based upon my personal knowledge, and my declaration stated hereinbelow is true and correct, and I hereby make this declaration pursuant to 28 U.S.C. § 1746, under penalty of perjury:

A.

INTRODUCTION

1. The trial process which my family (the plaintiffs) experienced during August 1998 was flawed by various unfair/unjust surprises, misrepresentations, and the like,

many of which were caused by **AMICA MUTUAL INSURANCE COMPANY** ("AMICA"), and/or by the IAS/NOBEL defendants ("IAS/NOBEL"), IAS CLAIM SERVICES, INC. and NOBEL SERVICE CORPORATION. Those AMICA-caused unfair surprises, misrepresentations, other types of misconduct, and the like, include (but are not necessarily limited to) the following:

a) AMICA's misleading assertions of its having paid the "policy limits", when in fact AMICA only paid approximately $4,000 of its policy's defined ALE limit of $12,000, – such that AMICA's assertions at trial regarding "policy limits" being merely $60,000 constituted misleading misrepresentation of material fact to the jury, that prejudiced the plaintiffs. For support of this point, please see, e.g., Tab C's Tr. 7B @ 48 and H2.

b) AMICA's and IAS' improper usage of **Steven Seidenfeld, M.D.**, as a designated expert witness who testified outside of his Rule 26 report, to the unfair surprise and prejudice of the plaintiffs. For support of this point, please see Tab S and Tab I.

c) AMICA's and IAS' improper usage of Kenneth Shumaker, as a designated expert witness who testified outside of his Rule 26 report, to the unfair surprise and prejudice of the plaintiffs. For support of this point, please see Tab P.

d) AMICA's improper usage of **Michael Quinn, Esq.**, as a designated expert witness who testified outside of his Rule 26 report, to the unfair surprise and prejudice of the plaintiffs. For support of this point, please see Tab Q.

e) IAS' improper usage of **David Terry**, as a designated expert witness who testified outside of the contents of his filed affidavit and without any previously disclosed Rule 26 report, to the unfair surprise and

prejudice of the plaintiffs. For support of this point, please see Tab T.

f) AMICA's and IAS' improper usage of **opening arguments**, – in ways inconsistent with Rule 26 disclosures and/or other responses to properly propounded discovery, to the unfair surprise and prejudice of the plaintiffs, and/or in ways that misleadingly misrepresented verdict-related facts to the jury. For support of this point, please see Tab B (as well as ¶ 2 through ¶ 2g hereinbelow).

g) AMICA's and IAS' improper usage of **closing arguments**, – in ways inconsistent with Rule 26 disclosures and/or other responses to properly propounded discovery, to the unfair surprise and prejudice of the plaintiffs, and/or in ways that misleadingly misrepresented verdict-related facts to the jury. For support of this point, please see Tab C (as well as ¶ 3 through ¶ 3s hereinbelow).

h) AMICA's and IAS' misleading characterizations of the Janiks' **"property losses"** as amounting to some $124,000, when this deceptively **failed to identify some $42,613** of the Janiks' insurance claims as being for "loss of use" damages, as opposed to for replacement value or repair related "property loss" damages. For support of this point, please see Tab V.

i) AMICA's misrepresentations about **my willingness to meet with AMICA and with IAS/NOBEL personnel** regarding the particulars of the Janiks' insurance claim and/or AMICA's failure to pay same, especially in light of my offers to meet with AMICA/IAS personnel, and IAS/NOBEL's decision to avoid meeting with me when I met with AMICA personnel during April 1994, – in ways inconsistent with Rule 26 disclosures and/or other responses to properly propounded discovery, to the unfair surprise and

prejudice of the plaintiffs, and/or in ways that misleadingly misrepresented verdict-related facts to the jury. For support of this point, please see Tab F.

j) AMICA's misrepresentations about **my communications with AMICA and IAS/NOBEL personnel** regarding the particulars of the Janiks' insurance claim and/or AMICA's failure to pay same, – in ways inconsistent with Rule 26 disclosures and/or other responses to properly propounded discovery, to the unfair surprise and prejudice of the plaintiffs, and/or in ways that misleadingly misrepresented verdict-related facts to the jury. For support of this point, please see Tab W and Tab F.

k) IAS' misrepresentations at trial involving **oral deposition quotes** despite the availability of my oral deposition and the corrigenda thereto, so as to mislead the jury as to the instance when I saw flooding liquids mixed with non-fecal material outside my family's residence on 10-31-1993. For support of this point, please see Tab E.

l) AMICA's and IAS' misuse of witness testimony at trial, regarding my supposed request for **"100% germ-free"** remediation of sewage-contaminated property items, – in ways inconsistent with Rule 26 disclosures and/or other responses to properly propounded discovery, to the unfair surprise and prejudice of the plaintiffs, and/or in ways that unjstly and misleadingly misrepresented verdict-related facts to the jury. For support of this point, please see Tab G.

m) AMICA's misuse of Tom Ferris' testimony at trial as to its mode, non-meaningfulness, and practices of advertising in conjunction with its supposedly being rated as **#1 in insurance consumer reports**, in conjunction with AMICA's Tom Ferris' trial testimony that AMICA's advertisements in Tom Ferris' annual reports (sent each year to AMICA's insureds) were

mere **"propaganda" and "baloney"**, – in ways inconsistent with Rule 26 disclosures and/or other responses to properly propounded discovery, to the unfair surprise and prejudice of the plaintiffs, and/or in ways that misleadingly misrepresented verdict-related facts to the jury. For support of this point, in addition to page 20 and page 30 of AMICA's response to discovery requests (provided at Tab N), please see, e.g., Tab R1 @ items 1, 2, and 4.

n) AMICA's improper usage of **Tom Ferris**, as a designated fact witness who testified in ways that controverted the discovery production and discovery responses provided by AMICA, – to the unfair surprise and prejudice of the plaintiffs. For support of this point, please see Tab R.

o) AMICA's and IAS/NOBEL's misuse of testimony at trial regarding the supposed **sewage contamination loss-related experience of AMICA and/or IAS/NOBEL**, – in ways inconsistent with Rule 26 disclosures and/or other responses to properly propounded discovery, to the unfair surprise and prejudice of the plaintiffs, and/or in ways that misleadingly misrepresented verdict-related facts to the jury. For support of this point, please see, e.g., Tab R1 @ #3 and Tab N1, N6, and Tab O1, O4.

p) AMICA's and IAS' misuse of testimony at trial regarding the supposed **typicality of AMICA's (and IAS') usage of a proof of loss form as a mere "payment tool" used to verify the identity of an insured as a payee of an insurance claim**, – in ways inconsistent with Rule 26 disclosures and/or other responses to properly propounded discovery, to the unfair surprise and prejudice of the plaintiffs, and/or in ways that misleadingly misrepresented verdict-related facts to the jury. For support of this point, please see, e.g., Tab R1 @ item #12 and Tab T3 @ items 17 & 18.

q) AMICA's misuse of AMICA personnel testimony at trial regarding a supposed **emergency service** that supposedly existed and was operational on 10-31-1993, – in ways inconsistent with Rule 26 disclosures and/or other responses to properly propounded discovery, to the unfair surprise and prejudice of the plaintiffs, and/or in ways that misleadingly misrepresented verdict-related facts to the jury. For support of this point, please see, e.g., Tab R1 @ item 5.

r) AMICA's misuse of testimony at trial suggesting that I am the **"most difficult"** insured that AMICA personnel have ever dealt with in their careers during the past 30 to 35 years (*supposedly being "at odds" with "everyone"*), – in ways inconsistent with Rule 26 disclosures and/or other responses to properly propounded discovery, to the unfair surprise and prejudice of the plaintiffs, and/or in ways that misleadingly misrepresented verdict-related facts to the jury. For support of this point, see Tab T2 @ item #9 and Tab Q1 @ item #4.

s) AMICA's misuse of the discovery process, as well as the trial process, to attack me as a designated witness in other ongoing (*Santos*) litigation being handled by AMICA's counsel, – as is more fully documented by the "PLAINTIFFS' MOTION FOR RELIEF, AND BRIEF, INCLUDING OBJECTION TO QUASH EXHIBIT #IT-28, ETC." (which filing is only alluded to herein, because it was already filed of record by plaintiffs during trial on 8-23-1998, and has not yet received a formal ruling from the presiding judge). See also Tab Y and ¶ 5 hereinbelow.

B.
SPECIFIC UNFAIR SURPRISES, MISREPRESENTATIONS, MISCONDUCT, ETC.

2. Opening Argument unfair surprises, misrepresentations, etc.

The opening arguments of AMICA and of the IAS/NOBEL defendants contained verdict-related unfair surprises, misrepresentations, and misconduct capitalizations that unfairly gave trial advantages to the defendants, prejudicing the plaintiffs (and the trial process), by unduly interfering with the jury's right to hear the truth.

2a. AMICA's **consumer ratings** were discussed (without any supporting evidence) by AMICA during opening argument. This assertion of supposed fact was improper, in light of AMICA's discovery responses. For support documenting this Rule 60(b) matter, please see Tab B's Tr. 1 @ 32.

2b. AMICA's and IAS/NOBEL's opening arguments asserted that **"policy limits" were paid to the Janiks,** with the AMICA policy coverage's "policy limits" being misleadingly characterized *as only the $60,000 available for unscheduled personal property*. This supposed fact was improper, in light of AMICA's discovery responses and the policy contract's own terms. For support documenting this Rule 60(b) matter, please see Tab B's Tr. 1 @ 37, 38, 39, 48.

2c. AMICA's opening arguments included the supposed assertion of the Janiks that their insured property needed to be cleaned to the extent that it was **"100% guarantee it's germ-free"**. This assertion by AMICA was improper, in light of AMICA's discovery responses. For support documenting this Rule 60(b) matter, please see Tab B's Tr. 1 @ 34, 37, 38.

2d. AMICA's opening argument asserted that **AMICA decided in December 1993 to "replace"** my family's sewage-contaminated property items (*rather than insist on cleaning and re-cleaning until fully restored condition*). This supposed fact was improper and misleading, in light of AMICA's own discovery responses, especially in conjunction with IAS/NOBEL's discovery production and response. For support documenting this Rule 60(b) matter, please see Tab B's Tr. 1 @ 38.

2e. AMICA's opening argument suggesting that the purposes and proposed usage of a **"proof of loss" form** was solely **so that AMICA would know whom to pay** *for my family's insured losses.* This misrepresentation inexcusably misstates the terms of the insurance contract as it defines the terms and conditions for using such a proof of loss form. For support documenting this Rule 60(b) matter, please see Tab B's Tr. 1 @ 39, 43.

2f. AMICA's opening argument that I was **impossible to satisfy** was inexcusably misleading, since I previously settled claims amicably with AMICA and with another insurer, yet AMICA objected to my related testimony supporting this inconsistency. For support documenting this Rule 60(b) matter, please see Tab B's Tr. 1, @ 35, 36, 40.

2g. AMICA's opening argument mischaracterized **AMICA's active and controlling role** *in getting contamination testing samples, having the samples tested and analyzed, and meeting with a scientific analyst* and the adjustor to decided how to makes decisions affecting my family's insured property in light of the contamination testing data. Moreover, AMICA's opening argument mischaracterized the level of involvement that AMICA's only agent on the scene ("IAS") would operate at, since AMICA's counsel falsely suggested that "The Insurance Company . . . doesn't say don't go in there, that's dangerous. They don't tell you anything."

For support documenting this Rule 60(b) matter, please see Tab B's Tr. 1 @ 34, 35.

3. Closing Argument unfair surprises, misrepresentations, etc.

3a. AMICA's and IAS/NOBEL's closing argument asserted that Jene Montague had told me that **AMICA and IAS approved of my family's moving our sewage-contaminated property immediately**, – as opposed to the facts of IAS/NOBEL refusing to grant us permission/approval to move our contaminated property items, since keeping the property inside the sewage-contaminated house would be "cheaper" (*i.e., "cheaper" from AMICA's and IAS/NOBEL's perspective, which perspective I was supposed to "cooperate" with*). This closing argument suggestion was improper, in light of AMICA's discovery responses. For support documenting this Rule 60(b) matter, please see Tab C's Tr. 7B @ 43, 44, 49, in conjunction with Tab M's Affidavit of Jene Montague and PX #739HH (*pages KJS313 through KJS319, plus handwritten notes on page KJS311*). See also Tab M1 through M2, and M3 with Tab M support.

3b. Closing arguments by AMICA's counsel unfairly mislead the jury regarding the **relationship of (1) the handling of the property contamination testing to (2) my family's insurance coverage-related rights**. This instance of unjustified misrepresentation of verdict-related facts was improper, in light of AMICA's discovery responses. For support documenting this Rule 60(b) matter, please see Tab C's Tr. 7B @ 44, 45, as well as Tab M.

3c. Closing arguments by AMICA's counsel unfairly misled the jury regarding my family's continued exposure to the **sewage-water-borne contaminants and the related sewage-aerosol-borne contaminants** *during the*

critical time-frame of November 2-8, 1993. This unjustified misrepresentation of verdict-related facts was improper, in light of AMICA's discovery responses. For support documenting this Rule 60(b) matter, please see Tab C's Tr. 7B @ 45, 47.

3d. AMICA's closing argument suggested that **AMICA was not responsible for having contamination testing done** on property items covered by AMICA insurance, prior to the time that AMICA tendered a so-called "total loss" payment check to the Janiks (*which did not occur until late March of 1994*). This instance of unjustified misrepresentation of verdict-related facts was improper, in light of AMICA's discovery responses. For support documenting this Rule 60(b) matter, please see Tab C's Tr. 7B @ 45, 47.

3e. AMICA's closing arguments included the false assertion, by me or my family, that our sewage-water-contaminated/sewage-aerosol-contaminated property needed to be cleaned to the extent that it was **"100% germ-free"**. This assertion by AMICA was improper, in light of the documentation that my family sought to have Blackmon-Mooring clean our property to EPA standards (*since Blackmon-Mooring said they would*), as well as in light of AMICA's discovery responses (see Tab N7, page JL00528, showing page 14 of AMICA's discovery response including AMICA's Response #23 to plaintiffs' document production requests). For support documenting this Rule 60(b) matter, please see Tab C's Tr. 7B @ 45. See also Tab G1 and support.

3f. AMICA's closing argument misrepresented the nature and extent of the **loss calculations within my "Report of Loss" form** (*e.g., the curio cabinet*). This instance of unjustified misrepresentation of verdict-related facts was improper, in light of AMICA's discovery responses. For support documenting this Rule 60(b) matter, please see Tab C's Tr. 7B @ 46, as well as Tab Z.

3g. AMICA's closing argument unfairly and misleadingly suggests that **AMICA paid "policy limits"** to the Janiks, *despite the evidence that the insurance policy contract's limit for loss of use was $12,000, yet that $12,000 limit was not paid to the Janiks, but only approximately $4,000 of that $12,000 was paid to the Janiks.* Since we provided adequate documentation of our entitlement to said policy limit of $12,000 (*which is a benefit under the AMICA policy that is separate from the AMICA policy's limit of $60,000 for unscheduled personal property*), this misleading misrepresentation to the jury was inexcusable. For support documenting this Rule 60(b) matter, please see Tab C's Tr. 7B @ 42, 43, 48, and Tab H2 @ page A001652, Tab U1 and support.

3h. AMICA's closing argument misleadingly suggests that Jene Montague of **"IAS" did not seek and obtain AMICA's approval prior to authorizing the release of the contamination testing data** provided to "IAS" by Blackmon-Mooring, yet IAS/NOBEL's own documentation indisputably shows that Jene Montague did such. Accordingly, this misrepresentation to the jury was an unfair surprise and was an example of jury verdict-related misrepresentation. For support documenting this Rule 60(b) matter, please see Tab C's Tr. &B @ 49, 50, Tab G, & Tab G5.

3i. AMICA's and IAS/NOBEL's closing argument suggested that David Terry and Tom Ferris had **never dealt with any supposedly problematic (*dissatisfied*) insured like me** during his 30+ years of insurance industry experience, and further suggested that this was "everyone" else's experience in this claims handling matter. This was prejudicially misleading to the jury in light of the complaint filed with the Texas Department of Insurance – against AMICA, – involving David Terry and Jene Montague – which complainti was filed by an insured named Jones, one of AMICA's

insureds. *In addition there are numerous complaints against AMICA (and IAS was involved in Fort Worth litigation, based upon claims handling practices*). For support documenting this Rule 60(b) matter, please see Tab C's Tr. 7B @ 45, 50, 51, 52, in conjunction with Tab J's page JL02162 and Tab K's J26026 and 26027 [also Bates-numbered as J27886-J2886]. See Tab J1 and support J2 and J14; see also K1 and support K2 through K4.

3j. AMICA's closing argument suggesting that the purposes and proposed usage of a **"proof of loss" form** was solely *so that **AMICA would know whom to pay** for my family's insured losses.* This misrepresentation inexcusably misstates the terms of the insurance contract as it defines the terms and conditions for using such a proof of loss form. For support documenting this Rule 60(b) matter, please see Tab C's Tr. 7B @ 52, as well as Tab H4 and Q1 @ item #5.

3k. AMICA's closing arguments improperly described expert Shumaker as having **"handled dozens of sewer loss claims"**, yet this highly relevant experience credential conflicts with its *non-disclosure* within his Rule 26 disclosure regarding expert Shumaker, an unfair surprise. For support documenting this Rule 60(b) matter, please see Tab C's Tr. 7B @ 52, as well as Tabs P1, P3, and P4, as well as Tab N1 and N6.

3l. AMICA's closing argument provided an unfair surprise by its negating its own **advertisements** (AMICA *"doesn't do all these things . . . "* advertised in their annual reports sent each year to all AMICA insureds; rather, Tom Ferris informed the jury that these ads were mere **"propaganda" and "baloney"**). For support documenting this Rule 60(b) matter, please see Tab C's Tr. 7B @ 53, as well as Tab R1 @ items #1 & #2.

3m. AMICA's closing argument contained an unfair surprise by referring to expert Shumaker's opinion that

the AMICA/IAS claim handling was supposedly following **"generally acceptable claim handling practices"**, since no such standards were ever produced – either in response to the mandatory Rule 26 disclosure rule – or in response to plaintiffs' propounded discovery for such claims handling policies, procedures, and/or standards. *Also, during trial IAS/NOBEL's counsel criticized plaintiffs' expert Thomas Veitch, Esq. for not reviewing any policies and procedures manulas of IAS/NOBEL, yet neither AMICA nor IAS/NOBEL timely produced any such documents to plaintiffs, so it was impossible for expert Veitch to have reviewed such prior to the court-imposed deadline for expert Veitch's Rule 26 report.* For support documenting this Rule 60(b) matter, please see Tab C's Tr. 7B @ 54, as well as Tabs N1, N11, N12, and N13.

3n. AMICA's closing argument unfairly relied on Dr. Seidenfeld's expert opinions on topics outside of his Rule 26 report, including a **misleading mischaracterization of the Janiks' medical history** as to bloody diarrhea, headaches, vomiting, and other sewage contamination-induced symptoms not ever simultaneously or so severely experienced by my family prior to 10-31-1993. Moreover, AMICA's closing argument unfairly relied on Dr. Seidenfeld's expert opinions as to said Dr. Seidenfeld's undisclosed opinions that conflicted with the City of Dallas' own publications[1] regarding it untreated sewage waters. (See generally Tab D materials.) For support documenting this Rule 60(b) matter, please see Tab C's Tr. Tr. 7B @ 55, 66, in conjunction with Tab D's PX #15 [Bates-identified as pages D601 through D605, as well as Tabs I1 and I2, with support I3 through I27.

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[1] Dr. Seidenfeld was retained jointly by all of the defendants.

3o. IAS/NOBEL's closing argument falsely asserted that I **hired[2] an attorney on the second day** after the Monday that I reported our insurance claim to AMICA. There was no evidence anywhere in the case of such, so this was an unfair surprise, a mischaracterization to fit the defense theme of "lawsuit abuse", and a jury verdict-tainting misrepresentation. For support documenting this Rule 60(b) matter, please see Tab C's Tr. 7B @ 59.

3p. IAS/NOBEL's closing argument falsely asserted that **I did not tender any medical records**, despite the fact that I tendered original receipts and documents obtained from our family's physicians and pharmacists. For support documenting this Rule 60(b) matter, please see Tab C's Tr. 7B @ 60, as well as Tabs I1 and I2 and support.

3q. IAS/NOBEL's closing argument falsely asserted that **my wife and I did not provide documentation of the property loss expenses, such as repair costs *(and basis for such)***, despite the fact that the I tendered original receipts and an itemized listing of my family's damaged property losses/expenses, as well as both my wife and I testifying about costs we lost or otherwise bore, which were examples of loss of use/additional living expense items (supported by trial exhibits regarding same). For support documenting this Rule 60(b) matter, please see Tab C's Tr. 7B @ 63, as well as Tabs U2, U3, and U4 regarding cleaning, replacement, and testing amounts.

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[2] This misrepresentation was objected to and the objection was sustained as to the word "hired"; – however, within the totality of the misleading circumstances of the closing argument, this error was still likely to prejudice the jurors' view of the plaintiffs.

3r. IAS/NOBEL's closing arguments *recklessly and misleadingly* ***mischaracterized how Dr. Brandon determined my family members' illnesses, pain and suffering (including mental anguish, stress, and physical pain and discomfort)***, and other personal injury symptoms as being *caused* by my family's exposure (and re-exposure) to the sewage water-borne and sewage aerosol-borne contaminants they were exposed to on 10-31-1993 and thereafter, in combination with the stresses that immediately followed 10-31-1993, as my wife, sons, and I tried our best to put our lives back together. For support for this Rule 60(b) matter, please see Tab C's Tr. 7B @ 61, 62, 64, 65, 66, 67, 69, as well as Tabs I1 and I2 and support I3 through I20, esp. @ I21 through I27.

3s. IAS/NOBEL's closing argument, – suggesting that none of the Janik family were seen by any physician for stress and the like, – falsely misrepresents my seeing Dr. Cowden for **stress**, for which emotional stress/mental anguish-type condition/symptoms Dr. Cowden treated me. *Also, I visited baylor physicians regarding severe headaches, which is a type of physical pain and discomfort that Dr. Brandon indicated as causally correlated to the emotional stress and mental anguish I was continually experiencing during that time-frame. For support documenting this Rule 60(b) matter, please see Tab C's Tr. 7B @ 66, 67, in conjunction with Dr. Brandon's trial testimony [which is not transcribed as of today's date].* See also, e.g., Tabs I1 and I2, as well as I12 through I20.

4. <u>Testimony Surprises & Misrepresentations contra to Discovery.</u>

See generally Tab N and Tab O (attached hereto).

4a. At trial an AMICA witness relyingly alluded to a telephone log (for support for that witness' testimony),

yet that supposedly existing telephone log was timely requested by the plaintiffs (during discovery) but was prejudicially not produced by AMICA, – an unfair surprise to plaintiffs. *This telephone log was never produced to plaintiffs, despite the mandate of Rule 26 disclosure.* For support documenting this Rule 60(b) matter, please see Tab R1 @ item 10, as well as Tabs N15 and N16.

4b. At trial an AMICA witness relyingly alluded to an **emergency answering service** (which supposedly was operational on Sunday, 10-31-1993), yet that supposedly existing emergency answering service was prejudicially not disclosed by AMICA, despite discovery propounded by the plaintiffs that should have prompted such a disclosure, – an unfair surprise to plaintiffs. When I called AMICA to report our 10-31-1993 loss claim, I was told by a telephone recording to call back during normal business hours. *Also, this so-called telephone log of AMICA's was never produced to plaintiffs, despite the mandate of Rule 26 disclosure.* For support documenting this Rule 60(b) matter, please see Tabs N15, N16, and R1.

4c. The recent fabrication **"re-cap" [identified as I-80 through I-86] of IAS' Jene Montague telephone conversations with me**, and Ms. Allen's report to AMICA [I-98 & I-99], were both not timely produced to plaintiffs, but rather were only discovered after discovery was over, being part of defense expert report reviewed-and-relied-on documents provided by defense experts in response to subpoenas duces tecum. This was misconduct that prevented the plaintiffs from meaningful use of such highly relevant yet withheld documents during the discovery time-frame. ***To provide such a recent fabrication to designated experts to use in preparing their reports, yet to withhold such documents from plaintiffs as if privileged, constituted an unfair***

surprise and made **a misrepresentation-marred mockery of the litigation process.** For support documenting this Rule 60(b) matter, please see Tab L's PX #521B, consiting of pages I3 & I4, in conjunction with Tab L1 through L4. See also Tab C's Tr. 7B @ 43, 44, 49, with Tab M's M1 through M5, & M6 through M13, as well as Tab V1 & V2 through V20, as well as Tab O1 and O7.

4d. David Terry testified at trial that **a proof of loss form was a mere payment "tool"**, which contradicts the terms and conditions of the insurance contract itself, which is an example of unfair surprise and misrepresentation designed to profit from one's own wrongdoing. Similar misleading trial testimony was provided by defense expert Shumaker. For support documenting this Rule 60(b) matter, please see Tab B's Tr. 1 @ 39, 43, with Tab C's Tr. 7B @ 52, in conjunction with Tab H's pages of the "TEXAS HOMEOWNER'S POLICY" [Tab H], showing the contractually limited usage of a proof of loss form [*on policy page 5, i.e., Bates #A001659*], and noting on "Loss Payment" [*policy page 6, Bates #A001660*] that AMICA must pay us "within 5 business days" after AMICA notifies us that AMICA "will pay your [i.e., our] claim". See Tab Q1 @ item 5, as well as Tab O1 and O13.

5. Quasi-Conflict of Interest involving misuse of discovery, etc.

Very early in the discovery process, the plaintiffs sought a confidentiality agreement/protective order ("CAPO"). An oral agreement-in-principle of the parties was reached initially, to agree to a CAPO; however, this did not promptly result in a written CAPO, due to defendants reneging on the oral agreement. After a hearing before Magistrate Judge Kaplan, a CAPO was executed and entered as an order of this Court.

Months prior to trial, plaintiffs notified defendants AMICA and IAS/NOBEL of apparent violations of the CAPO and requested prompt cures thereof.

Despite these notifications AMICA and IAS/NOBEL designated and offered as trial exhibits documents containing my confidential financial information, in violation of the CAPO, to which plaintiffs objected at trial.

Plaintiffs submitted two motions during the trial to seek relief from this CAPO-violative abuse by the defendants, and plaintiffs requested this Court to specifically rule on said CAPO violation abuses. AMICA's counsel accepted representation against a client of mine, after knowing that they were litigating against me in this case. (*Prior to trial, AMICA's counsel was questioned about this by Magistrate Judge Kaplan, but AMICA's counsel was evasive about the status of the "other" (Santos) case – and now that "other" case has been re-set for trial in January 1999.*)

This harassing bad faith misconduct, appears to show that AMICA's counsel was improperly seeking to gain access to CAPO-protected confidential information of me, and then sought (with assistance of IAS/NOBEL counsel) to have such CAPO-protected information introduced into evidence at trial in this case, so that it could be unprotected (and thus used against me) in the contemporaneously pending *Santos* case.

How can a "Chinese wall" or other means of segregation be in place when two brothers (the Fanning brothers of the firm that represents AMICA) are working on two cases involving the same person (i.e., me) – an opposing party who agreed to a CAPO in one case and an opposing expert witness in the other (*Santos*) case with no protection from a CAPO.

This apparent bad faith abuse of the CAPO-related aspects of the litigation process is addressed more fully in **pages 1-8** of the "PLAINTIFFS' MOTION FOR RELIEF, AND BRIEF, INCLUDING OBJECTION TO QUASH EXHIBIT #IT-28, ETC." (filed by plaintiffs during trial on 8-23-1998), *q.v.* (See Tab Y1 and support Y2 through Y8.)

SIGNED & VERIFIED THIS 17 of November, A.D. 1998.

/s/ Ernest A. Janik, Jr.
ERNEST A. JANIK, JR., declarant